APPEAL NO. 010386

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing was held on September 26, 2000, November 21, 2000, and January 22, 2001, with the record closing on January 22, 2001. With respect to the issues before her, the hearing officer determined that the respondent (claimant) sustained a compensable low back in jury on _____; that "the Carrier's [appellant] contest of compensability was not based on newly discovered evidence that could not have been discovered at an earlier date"; that the claimant's "low back injury was not the result of Claimant's wilful attempt to injure himself"; and that "Claimant did not sustain an injury to his neck in addition to his low back." The issue that the claimant did not sustain a neck injury has not been appealed and has become final. Section 410.169.

The carrier appeals, contending essentially that pursuant to Section 409.021 of the 1989 Act it may reopen the issue of compensability based on newly discovered evidence; that the claimant had not sustained a new injury to his back; and that "the carrier should be relieved of liability based on an intentional injury" pursuant to Section 406.032 of the 1989 Act. There is no response from the claimant.

DECISION

Affirmed.

The claimant testified that he sustained an injury to his low back while cutting anchor bolts with a bolt cutter for his employer on _____. On the same day, the employer sent the claimant to a medical center where the claimant was diagnosed with a lumbar strain. The carrier initiated an investigation, which included taking the claimant's recorded statement on July 8, 1999, where the claimant disclosed that he had had a prior low back injury that required surgery "five or six years ago." The claimant was vague as to who the employer was, who the doctor was that treated him for that injury, and the precise date of the injury. It is unclear from the evidence, but apparently the carrier accepted liability for a low back injury. At a benefit review conference (BRC) on March 3, 2000, the claimant was able to more specifically identify his treating doctor for the earlier compensable injury.

At a subsequent BRC, the issues in this case were identified and the carrier asserts that because it had newly discovered evidence, the compensability issue concerning the low back should be reopened. The carrier asserts that because it has newly discovered evidence, namely information regarding the claimant's 1995 compensable injury, which should allow it to reopen compensability of the low back injury, and that the hearing officer erred in not reopening the compensability issue. More specifically, the carrier asserts that it did not have full information concerning a prior back injury the claimant sustained in 1995. The hearing officer held that "Claimant disclosed in his July 8, 1999, recorded statement that he had a prior low back work related injury." On page 7 of the statement, the claimant informed the carrier that he had an on-the-job injury about 5 years ago that

required surgery. From the record, it appears that the carrier performed no further investigation on that issue until March of 2000.

Under the provisions of Section 409.021(d), an insurance carrier may reopen the issue of the compensability of an injury if there is a finding of evidence that could not reasonably have been discovered earlier. Whether due diligence is shown in contesting compensability upon the discovery of new evidence or whether the evidence could have reasonably been discovered earlier are questions of fact for the hearing officer to determine. *See* Texas Workers' Compensation Commission Appeal No. 92218, decided July 15, 1992.

There are two components to being allowed to reopen compensability or present additional grounds: the information must not only be "newly discovered" but, further, prove to have been unavailable or unaccessible through the carrier's reasonable exercise of its duty to investigate the claim (in other words, not discoverable at an earlier time). *See* Texas Workers' Compensation Commission Appeal No. 992828, decided February 2, 2000.

The hearing officer found that "a reasonable search and investigation by Carrier would have resulted in the discovery of the . . . [newly discovered evidence]." The hearing officer's determination that due diligence was not shown to be against the great weight of the evidence.

Nonetheless, the hearing officer, at the request of the carrier, added the issue of whether "the Claimant sustained a compensable injury on _____." Dr. R wrote a letter (*see* Claimant's Exhibit No. 7 page 6) wherein he states "[t]his is a new injury. This is not related to [claimant's] previous injury of _____ where he was treated by Dr. C." Dr. S testified on behalf of the carrier that the claimant did not sustain a new injury. The hearing officer held that the claimant sustained a compensable injury to his low back. The evidence was in conflict and where there are conflicts in the evidence, the hearing officer resolves the conflicts and determines what facts the evidence has established. (Garza v. Commercial Insurance Company of Newark, New Jersey, 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ).)

The carrier also argues that the hearing officer erred in her determination that "Claimant's _____, low back injury was not the result of the Claimant's wilful attempt to injure himself cutting steel anchor bolts for Employer." The carrier claims that because the claimant returned to work as a laborer he did not follow directions from his doctor in 1995 to not lift more than 20 pounds, and this was a wilful intent to injure himself thereby precluding the claimant from recovering benefits pursuant to Section 406.032 of the 1989 Act. The claimant testified that he was released to return to work with no restrictions after his 1995 injury. Section 406.032(1)(B) provides that a carrier is not liable for compensation if the injury was caused by the employee's wilful attempt to injure himself or to unlawfully injure another person. The hearing officer's determination that the claimant's return to

work as a laborer and the resultant low back injury was not a result of the claimant's wilful attempt to injure himself is supported by the evidence.

The decision and order of the hearing officer are affirmed.

Thomas A. Knapp
Appeals Judge

CONCUR:

Judy L. S. Barnes
Appeals Judge

Elaine M. Chaney
Appeals Judge